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July 8, 2008

MUR # 6037

Thomasenia Duncan, Esq
General Counsel
Federal Election Commission
999 E Street, N W
Washington, D C 20463

Re Complaint against Jeff Merkley, Jeff Merkley for Oregon and the Democratic Party of Oregon

Dear Ms Duncan

This is a complaint pursuant to 2 U S C §437g(a)(1) and 11 C F R §111.4 against Jeff Merkley, Democratic nominee for the United States Senate from Oregon, ("Merkley"), Jeff Merkley for Oregon, Merkley's principal campaign committee ("Merkley Campaign") and the Democratic Party of Oregon ("Democratic Party") (collectively hereafter, "Respondents")

The facts below disclose Respondents' violation(s) of numerous provisions of the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), and a willful and continuing disregard by Respondents of federal campaign finance rules and regulations governing soft money, coordinated expenditure limits by political parties on behalf of their nominees, and specific intent to circumvent the provisions of McCain-Feingold and its prohibitions on use of non-federal funds for federal candidates

The Complaint is filed by the Friends of Gordon Smith Committee, located in Lake Oswego, Oregon, by and through its Campaign Manager, Brooks Kochvar ("Complainant"), a resident of Clackamas County

SUMMARY OF COMPLAINT AND VIOLATIONS OF LAW

Based on publicly available communications and documents, it is clear that Respondents have conspired to engage in violations of FECA. An analysis of the facts demonstrates a purposeful and deliberate effort by Respondents to circumvent both the federal contribution limits and coordinated spending limits, resulting in illegal in-kind, excessive and potentially prohibited contributions from the Democratic Party to Merkley and the Merkley Campaign

Specifically, Merkley and the Merkley Campaign have worked in coordination with the Democratic Party to create and disseminate a television advertising campaign, the cost of which exceeds both the Democratic Party's legal contribution limit to the Merkley Campaign and the statutory limit on the Democratic Party's allowable expenditures that may legally be coordinated with their nominee for the United States Senate

Additionally, the Democratic Party may be using funds from its state, rather than its federal, account to pay for the broadcast advertisements at issue in this complaint featuring Merkley, the Democratic candidate for the U S Senate

Merkley has obviously collaborated with the Democratic Party to develop and disseminate advertising paid for by the Democratic Party of Oregon *purportedly* without authorization from the Merkley Campaign. However, the advertisement's most prominent feature is Merkley, and the script of the advertisement is taken largely from statements contained on the Merkley Campaign website. Such activity is a calculated effort to evade the prohibitions and limitations of federal law and constitute illegal coordinated communications that exceed the legal limits. Further, the advertisement contains a false disclaimer that is not in compliance with federal regulations.¹

Specific Facts of the Complaint

- 1 Jeff Merkley filed his Statement of Candidacy on August 1, 2007. Jeff Merkley's Senate campaign committee, Jeff Merkley for Oregon, filed its Statement of Organization on August 1, 2007.
- 2 On or about November 13, 2007, Jeff Merkley for Oregon posted information under the issues portion of their website entitled "Honoring Americans Veterans." The page discusses Merkley's Record as Speaker of the Oregon House of Representatives and future steps Merkley would take as a Senator to aid veterans, including tax assistance and healthcare benefits. The text of the posting is attached hereto as Attachment B.
- 3 On or about July 1, 2008, a 30-second television advertisement featuring Jeff Merkley was placed in the largest media markets in Oregon. The text of the advertisement and a CD-ROM containing the video are attached hereto as Attachment A.

¹ Any campaign communication authorized by a candidate or candidates committee must comply with the "general content requirements" of 11 CFR 110.11(b)(2), the "specifications for all disclaimers" in 11 CFR 110.11(c)(1), and the "specific requirements for television communications authorized by a candidate" in 11 CFR 110.11(c)(3). AO 2004-1. In addition, television advertisements authorized by a candidate are required to include a candidate appearing in an unobscured, full screen view making a statement that identifies the candidate and states his or her approval of the communication or a voice-over of a photograph of the candidate to a similar effect. 11 CFR § 110.11(c)(3)(u).

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- 4 Jeff Merkley identifies himself and his voice is heard throughout the communication Merkley speaks directly to the camera and is pictured shaking hands with military veterans
 - 5 The communication begins with Merkley's voice saying that "something is seriously wrong in Washington, D C" and discusses bills passed by the U S Senate, including tax legislation, congressional pay, funding for the war in Iraq, and healthcare benefits for veterans The communication cites to a U S Senate vote on November 17, 2007 Merkley ends by stating that those serving in the armed forces "have done everything they have been asked" and that we should be giving veterans "respect they deserve "
 - 6 Despite Merkley's prominent appearance in the communication, the spoken disclaimer states that "the Democratic Party of Oregon is responsible for the content of this advertising" The written disclaimer states "Paid for by the Democratic Party of Oregon www dpo org Not authorized by any candidate or candidate's committee The Democratic Party of Oregon is responsible for the content of this advertisement "
 - 7 For the 2007-08 election cycle, the total amount allowable under federal law for combined state and national party committee expenditures that may be made by political parties for and coordinated with their nominees for the U S Senate race in Oregon is \$485,200 As of May 31, 2008, the DSCC reported having spent \$386,088 63 The initial buy for the television advertisement at issue in this complaint was approximately \$220,000 based on information obtained from public sources Additional expenditures continue and the Complaint will be supplemented as information becomes publicly known See Attachment C
 - 8 On July 3, the Merkley Campaign issued a press release entitled "On 4th of July, Merkley Says It's Time to Give Troops Respect They Deserve" Merkley is quoted in his campaign press release stating that "these men and women have done everything we ask" and that "politicians in Washington, D C have denied our troops a tax deduction for their combat pay and proper health care when they return home " The text of the posting is attached hereto as Attachment D

Count I

Respondents Merkley, Merkely Campaign and the Democratic Party Have Violated Federal Law by Coordinating Public Communications in Excess of Federal Contribution Limits

The ad paid for by the Democratic Party featuring Merkley is a coordinated public communication as defined in federal law The Bipartisan Campaign Reform Act of 2002 ("BCRA") and its implementing regulations govern coordinated public communications The Federal Election Commission has provided a three-prong test at 11 C F R §

109 21(a) to determine whether a public communication is "coordinated " A communication is deemed "coordinated" if it meets all of the following requirements

- 1) The communication is paid for by a person or entity other than the candidate's campaign committee,
- 2) One or more of the content standards is satisfied, and
- 3) One or more of the conduct standards is satisfied

11 C F R §§ 109 21(a)(1)-(3), 109 37(a)(1) – (3) The public communication at issue fulfills all the requirements of the three-prong test for a coordinated communication

Payment A disclaimer at the end of the ad states that it was paid for by the Democratic Party of Oregon Because the ad was not paid for by Merkley or the Merkley Campaign, the ad fulfills the "payment" prong set out at 11 C F R §§ 109 21(a)(1), 109 37(a)(1)

Content In part, 11 C F R §§ 109 21(c)(2) and 109 37(a)(2) set out that the "content" requirement of the three-prong test is satisfied when a public communication that fulfills the payment prong "disseminates, distributes or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee "

Circumstances surrounding the dissemination of this ad indicate that the communication should be classified as campaign materials Merkley is a candidate for Federal office Prior to the time in which he secured the Democratic nomination for Senate from Oregon,² Merkley appeared in no such ads on behalf of the Democratic Party The fact that the ad is being aired following a primary election and prior to the general election, and that Merkley never appeared in such ads prior to his Federal candidacy is evidence of the fact that the ad is a campaign advertisement

Further, the content of this ad, the materials posted on the Merkley Campaign website and the press release issued by the Merkley campaign are virtually identical The language and the statements regarding the issues discussed in the Merkley Campaign's November 17 posting are the same as those highlighted in the ad See Attachment B Most telling, however, is the press release that was issued by the Merkley Campaign within two days of the Democratic Party's airing of the television advertisement The press release and its contents remain on the Merkley Campaign website for the duration of the ad buy across the state of Oregon See Attachment C

Phrases from this press release are taken directly from the script of the ad For example, the ad tells the listener that they should give veterans "respect they deserve," the press release's title includes the exact same language The ad begins with the line that "something is seriously wrong in Washington, DC when Congress votes to raise their own pay and cut taxes for millionaires " The press release argues that "politicians in Washington, D C have denied our troops a tax deduction for their combat pay and proper health " The ad shows Merkley saying, "our troops have done everything they have been asked" and the press release quotes Merkley as saying, "these men and women have done

² The Oregon Senate primary was May 20, 2008

everything we ask " Given the clear evidence, the ad clearly is "disseminated, distributed, and/or or republishing, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee "

If the Democratic Party actually intended this to be a genuine issue ad and not a coordinated campaign advertisement, the ad should and could have been narrated by any person, or even a voice not attributed to any person. Instead, the advertisement was narrated by the Democratic Party's nominee for the United States Senate who is identified by name and appears in the advertisement. Thus, the Democratic Party, Merkley and the Merkley Campaign have conspired to create and disseminate the advertisement in violation of federal law.

Even a "genuine issue advertisement under *FEC v Wisconsin Right to Life, Inc* 551 U S ___ (2007) cannot be illegally coordinated with candidates for federal office.

Conduct At least two of the conduct standards set forth at 11 C F R § 109 21(d) are satisfied with respect to the advertisement at issue.

The communication satisfies the "material involvement" standard of 11 C F R § 109 21(d)(2)(i)-(vi). The Commission has previously determined that a candidate's appearance in an advertisement is *prima facie* evidence that the candidate was materially involved with the communication. See Advisory Opinion 2003-25 (Weinzapfel). As the Commission explained, "Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication." *Id*

The logic applied by the Commission regarding material involvement in Weinzapfel applies with equal force to the "substantial discussion" standard of 11 C F R § 109 21(d)(3). Based on the fact that Merkley agreed to appear, and did appear, in the communication, it is highly implausible to think that Merkley and/or his agents did not discuss Merkley's campaign activities and other political needs with the Democratic Party of Oregon over the course of the ad's planning and production. In producing and distributing the communication, the Democratic Party of Oregon unquestionably took these needs and plans into account during the decision-making process.

The campaign communication at issue is a coordinated communication because it satisfies the three-prong test.

As a result of the coordination among the Respondents, the costs of the production and dissemination of the advertisement by the Democratic Party constitutes an in-kind contribution from the Democratic Party to the Merkley and the Merkley Campaign, which amounts exceed the legal limits for both contributions and coordinated party expenditures. Such contributions are, therefore, excessive and illegal contributions to Jeff Merkley and the Merkley Campaign.

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Count II

Respondents Merkley, the Merkley Campaign and the Democratic Party Knowingly and Willfully Conspired to Violate Federal Law by Coordinating Illegal Expenditures

The advertisement also runs afoul of the plain terms of 2 U S C § 441a(a)(7)(B)(i) ("expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate") and 11 C F R § 109 20

11 C F R § 109 20(a)states "*Coordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee*" Under 11 C F R § 109 20(b), "[a]ny expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 C F R § 109 21 or a party coordinated communication under 11 C F R 100 37, is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee "

Thus, if the advertisement is found to be made with "cooperation, consultation or concert," but not to satisfy the requirements of 11 C F R § 109 21 or 11 C F R § 109 37, it is still a coordinated communication

It is clear that the advertisement was made in "cooperation, consultation or concert" with Merkley, the Candidate Merkley appeared in the advertisement and, therefore, the advertisement was obviously made with his cooperation and in concert with him Respondents here could not have acted independently to produce the television advertisement in question and obviously did NOT act independently in developing and dissemination the advertisement

Because the communication was coordinated between Merkley, the Merkley Campaign and the Democratic Party, it is an "in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee " 11 C F R § 109 20 Therefore, the advertisement violates the federal contribution limits and is an illegal contribution from the Democratic Party to Merkley Additionally, Merkley and the Merkley Campaign have accepted an excessive contribution, and potentially a contribution from a prohibited source, in connection with this advertisement³

Under 2 U S C § 441a(a)(7)(B)(i) and 11 C F R § 109 20, the advertisement is clearly coordinated between Merkley and the Democratic Party As stated in the disclaimer, the

³ *Id*

advertisement was paid for by the Democratic Party of Oregon and is, therefore, and illegal, excessive contribution to the Merkley campaign

Count III

Merkley and the Merkley Campaign Violated the "Stand By Your Ad" Requirements of BCRA

A communication that is a party coordinated communication authorized by the candidate or candidate's committee within the limits of 2 USC 441d(a) must contain the required disclaimers under federal law 11 C F R § 110.11 sets forth the language that must be contained in disclaimers for a television advertisement coordinated with and authorized by a federal candidate See 11 C F R § 110.11

It is simply impossible to assert as the advertisement's disclaimer does that this communication was not authorized by a candidate Merkley appears in the ad and reads the script to the camera, thus authorizing the advertisement in which he appears Accordingly, the disclaimer required by federal law for candidates must include the "Stand By Your Ad" language See 11 C F R § 110.11

The advertisement purports to be 'independent of and not authorized by any candidate', which is obviously incorrect inasmuch as Merkley himself appears in the ad and reads the language of the script into the camera

Count IV

The Democratic Party May Have Illegally Funded Federal Election Activity with Corporate Funds from the Democratic Party's State Account

The advertisement at issue satisfies the definition of "Federal election activity" Specifically, it is "a public communication that refers to a clearly identified candidate for Federal office and that promotes or supports a candidate for that office" 2 U S C § 431(20)(A)(iii), *see also* 11 C F R § 100.24(b)(3)

The sole purpose of this advertisement is to increase Jeff Merkley's name recognition in Oregon, and to present him in a positive light to Oregon voters This is precisely what it means to "promote" a federal candidate in accordance with the FEC standards for such activity

Such communications are not allocable by state party committees and may not be paid in whole or in part with non-federal funds 11 C F R § 300.33(c)

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If this advertisement was funded in any part with nonfederal funds, the Democratic Party has also violated BCRA's prohibition on the use of soft money to promote or support federal candidates and elections

Unlike federal law, Oregon state law permits the state party to accept contributions from corporations. Any funds paying for the advertisement which may have come from the Oregon Democratic Party's state, not federal, account, would render the expenditures for the ad and its dissemination to be illegal corporate contributions from the Democratic Party to the Merkley Campaign

It is unclear at this time what the source of payment for the advertisement's production and airing is, because the Democratic Party started its airing of the ad on July 1, 2008. The next report of the Democratic Party to the Federal Election Commission for the month of July is due to be filed on August 20, 2008, and the Democratic Party has not publicly disclosed which account it has used to fund the communication. If the advertisement has been paid for in whole or in part with non-federal funds or funds allowable under Oregon state law (but prohibited under federal law), then the advertisement will have been paid for with corporate funds prohibited by 2 USC § 441b

COUNT V

The Facts Giving Rise to this Complaint Constitute a Knowing and Willful Violation of Federal Law in an Approximate Amount of \$220,000 and Should be Reviewed for Potential Referral to the United States Department of Justice

The amount at issue regarding this advertisement is approximately \$220,000 unknown production costs. Clearly, the Respondents in this project have conspired actively to circumvent the limits and possibly the source prohibitions of federal law strictly governing federal campaigns, candidates and political parties as set forth in BCRA and FECA.

When Congress enacted BCRA in 2002, it included a provision designed to strengthen the enforcement and penalties against deliberate violations of the law. 2 U S C 437g(a)(5), (6), (12), 28 U S C 2461 *nt*. As the Federal Election Commission stated in promulgating the BCRA regulations related to the new civil penalties, "The Act imposes civil penalties on anyone violating any portion of FECA. The Act's civil penalties, found at 2 U S C 437g(a)(5), (6), and (12), are organized into two tiers of monetary penalties, one tier of penalties for violations of the Act, and a second tier of penalties for "knowing and willful" violations of the Act." *Explanation and Justification of Rules and Regulations of the Federal Election Commission*, Vol 67 Federal Register, No 240, 76962 @ 76969 (Friday, December 13, 2002)

Further, FECA (2 U S C 437g(d)(1)(A)) was amended by BCRA to include not only increased civil penalties but also criminal penalties for knowing and willful violations of law. "(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution,

donation, or expenditure— "(1) aggregating \$25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years "

Respondents here have spent well above the \$25,000 threshold for potential criminal referral and these Respondents should be held to the very highest standard of responsibility for noncompliance with federal law Their willful and flagrant violation of the law must be punished accordingly

Conclusion

As a result of the above information, the undersigned hereby demands that the Federal Election Commission conduct an investigation into the facts and circumstances set forth in this Complaint and that the individuals and organizations involved in this matter be ordered to comply with provisions of federal law, and that other appropriate action to remedy these violations be ordered

Respectfully Submitted,

Brooks T Kochvar
Campaign Manager
Friends of Gordon Smith

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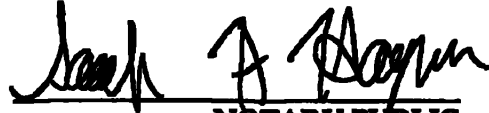
ATTESTED AND SWORN

County of Clackamas
State of Oregon

Brooks T Kochvar hereby verifies under penalty of perjury that the above statements are true and correct to the best of my information and belief and based upon the publicly available information provided to the Commission and attached to this Complaint Sworn to pursuant to 18 U S C § 1001


Brooks T Kochvar

Before me appeared this 0 day of July, 2008, Mr Brooks Kochvar The foregoing instrument was subscribed and sworn before me this day as true and correct


NOTARY PUBLIC

SEAL

My commission expires Oct 18, 2010



ATTACHMENT A

Script of Advertisement

Jeff Merkley

Something is seriously wrong in Washington, DC when Congress votes to raise their own pay and cut taxes for millionaires

Then sends American troops to war in Iraq but denies them a tax deduction for the combat pay, and cuts their healthcare when they return home

I'm Jeff Merkley and our troops have done everything they have been asked with distinction We need to start giving them the respect they deserve

Announcer

The Democrat Party of Oregon is responsible for the content of this advertising

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ATTACHMENT B

Honoring America's Veterans

There is no greater gift Americans can give to their country than being willing to fight and die for the ideals our nation was founded on. And there is no greater obligation than for the government that owes its existence to their sacrifice to support and care for them when they return from the battlefield.

Every American owes a debt of gratitude to our veterans that none of us will ever be able to fully repay. As a society that has asked so much of our men and women in uniform in recent years and throughout our history, we strive to honor them and their service.

Under Jeff's leadership as Speaker, the 2007 legislature renewed its commitment to helping Oregon veterans get the services they need and improving their quality of life. Among the accomplishments of the 2007 legislative session were:

- An extension of the Oregon personal income tax exemption to more members of our national guard**
- Additional financial aid for veterans pursuing full or part-time study or training**
- New preference guidelines that encourage public employers to hire veterans applying for civil service positions**
- Tax incentives for health care providers that participate in the TRICARE program in order to provide more facilities for veterans to receive medical care**

Jeff also personally developed a plan in coordination with the DMV to develop a special Oregon license plate honoring recipients of the Congressional Medal of Honor.

But the federal government must do more to support servicemen and women who have fought for our country, including:

- Immediately enacting concurrent receipt benefits allowing disabled veterans to collect their full retirement pay when they leave service. The current plan will not be fully phased-in until 2014.**
- Increased funding for mental health services to veterans returning from Iraq and Afghanistan. An estimated one-third of those veterans suffer mental health problems.**

• **Proper screening and treatment for Traumatic Brain Injury for returning veterans** The signature injury of the wars in Iraq and Afghanistan is TBI, and an estimated 300,000 veterans may return home suffering from it

• **Fully funding the VA health care system** Veterans often are forced to wait months for an appointment to see a doctor, and very often they have to travel great distances for care because there are too few facilities to provide effective treatment The disgraceful conditions at Walter Reed Army Medical Center are symptomatic of a system-wide problem that must be addressed immediately

• **Expanded educational opportunities for veterans who have fulfilled their service commitment to our country** Following World War II, the G I Bill helped hundreds of thousands of veterans pay for a college education We need a new G.I. Bill for the 21st Century (H R 2385) to help the veterans of our recent conflicts get a college education or job training

• **Revised deployment guidelines that require servicemen and women be given at least as much time at home as they spend on each tour of duty**

• **Extend full VA and other benefits to members of the National Guard who have been deployed overseas** Our National Guardsmen and women are being deployed in unprecedented numbers to support the wars in Iraq and Afghanistan They deserve the same benefits we extend to our regular soldiers, sailors, airmen and Marines

We have seen a tragic shortfall in recent years in veterans' health care and support services Sub-par conditions at Walter Reed Army Medical Center, six-month waiting periods to see a doctor – this is not how America should treat its greatest patriots We can and must do better

Posted November 13, 2007

Copied from [http //www.jeffmerkley.com/](http://www.jeffmerkley.com/) on July 4, 2008

ATTACHMENT C

On 4th of July, Merkley Says It's Time to Give Troops Respect They Deserve

Renews Call for Tax Relief, Quality Health Care, Free Tuition for Family of Fallen Soldiers

On the Fourth of July, House Speaker Jeff Merkley, candidate for U S Senate, is renewing his call for tax relief for our troops, quality health care for our veterans and men and women in uniform, and free tuition for the families of fallen soldiers

"During this important holiday I will join with thousands of Oregonians to celebrate the birth of America and honor the sacrifice and dedication of our troops," said House Speaker Jeff Merkley, candidate for U S Senate "These men and women have done everything we ask of them and deserve our undying respect While we have delivered for veterans here in Oregon, politicians in Washington, D C have denied our troops a tax deduction for their combat pay and proper health care when they return home It is time to give our troops the respect they deserve "

As Speaker of the Oregon House, Merkley delivered for veterans and men and women in uniform in Oregon Under Merkley's leadership, the 2007 legislature

- * Improved health care for veterans,
- * Cut taxes for more members of the Oregon National Guard,
- * Expanded financial aid for veterans pursuing full or part-time study or training, and
- * Established new public service opportunities for veterans

Merkley has a plan to give America's veterans and men and women in uniform the respect they deserve In the U S Senate, Merkley will

- * Fully fund the VA health care system,
- * Extend full VA and other benefits to members of the National Guard who have been deployed overseas,
- * Revise deployment guidelines that require servicemen and women be given at least as much time at home as they spend on each tour of duty,
- * Increase funding for mental health services to veterans returning from Iraq and Afghanistan,
- * Immediately enact concurrent receipt benefits to allow disabled veterans to collect their full retirement pay when they leave service, and
- * Ensure proper screening and treatment for Traumatic Brain Injury for returning veterans

Honoring the Families of Fallen Soldiers

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Under Merkley's leadership, the 2007 Oregon Legislature passed legislation to honor the sacrifice of the brave men and women who gave their lives in service to our country in Iraq and Afghanistan by promising free tuition to their family members

Merkley has announced that in the U S Senate he will fight for the same commitment In the U S Senate, Merkley will work to provide free tuition to four-year colleges and technical schools for the spouses and children of those who die in the line of duty serving our country

Posted July 3, 2008

Copied from [http //www.jeffmerkley.com/](http://www.jeffmerkley.com/) on July 4, 2008

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